terms and conditions of the policy are before the court and it is a term of the policy that the insured shall repay to the insurers all sums paid by the insurers which they would not have been liable to pay but for the legislation.

It is absolutely clear on the normal construction of the policy that it is a condition precedent of the policy that the insured should give notice as soon as possible of the accident and it is just as clear that there is a condition in the policy that the insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the legislation. Under the normal law of contract there is no liability of a contracting party to meet its obligations under the contract in the presence of a breach of condition by the other party. The Road Traffic Ordinance, 1958. however by section 80 makes it obligatory on the part of the insurer to meet any judgments obtained by the third party and provides that any clause restricting this duty is null and void as against the third party. But there is reserved to the insurers the right to claim for reimbursement.

The payment to the third party in this case was not in satisfaction of a judgment but it was nevertheless a payment made in the interests of the insured and the insurers in reasonable abortion of a claim at law which the plaintiff company, reasonably, in my view, thought was indefensible. The right to claim reimbursement was preserved by contract between the insured and the insurer and in my view the plaintiffs must succeed in this case.

There will be judgment for the plaintiffs for the sum of $5,500 and costs.

Judgment for the plaintiffs.

Solicitors: *Peh Swee Chin; Gibb & Co.*

ANGLO-AMERICAN CORPORATION (M) SDN. BHD. v. DATO' PHUA CHENG LEONG

[F.C. (Azmi L.P., Suffian and Gill F.JJ.) February 10, 1969]

[K.L.—Federal Court Civil Appeal No. X65 of 1968]

Hire-Purchase — Repossession by owner — Notice to terminate — Claim of arrears of hire-rent — Right to recover — Hirer cannot recover any payment made under agreement — Contracts (Malay States) Ordinance, 1950, ss. 75 and 98.

Contract — Guarantor — Liability of — Hire-purchase agreement — Arrears of hire-rent.

This was an appeal from the decision of the High Court on a claim by the appellants for instalments due under a hire-purchase agreement of a tractor. The hirer had paid the initial payment of $6,451 under the agreement and up to May 6, 1964 had paid by way of hire-rent the sum of $13,336 when the total amount due as hire-rent was $33,124, so that by that date he was in arrear with the rent to the extent of $19,788. The appellants sent a letter to the hirer informing him that as he had failed to pay the instalments they had instructed their representative to repossess the tractor. The learned trial judge found that no notice was re-required to terminate the hiring but if notice was required the letter was sufficient notice for that purpose. He also held that the respondent as guarantor was liable to pay the sums due under the agreement. The learned trial judge then found that the amount recoverable was $3,047 made up as follows:— The agreed hire-purchase price was $49,034, the first defendant had paid a total of $19,787 and therefore the balance of the purchase price was $29,247. The appellants resold the seized tractor for $32,200 after spending $6,000 on the repairs, so the amount they recovered was $26,200. The learned trial judge gave judgment for the appellants for the difference, that is $3,047.

Held, allowing the appeal: (1) the learned trial judge had misdirected himself in law and had failed to distinguish between the claim for arrears of monthly hire-rent and the claim by way of compensation for depreciation. The appellants were entitled to recover the balance of instalments due, and the amount already paid by the hirer and the amount realised by the resale of the property were wholly irrelevant to this claim;

(2) no case had been made out by the respondent for equitable relief which could exempt him from liability to pay the hire-rent;

(3) the appellants were therefore entitled to judgment in the sum of $19,788 in respect of arrears of hire-rent and $500 in respect of repossession fees making a total of $20,288 with interest as claimed.

Cases referred to:—

(1) *Anglo-American Corporation Ltd.* v. *Goodwood Sawmill Co.* [1961] 1 M.L.J. 263.

(2) *Helby* v. *Matthews* [1895] A.C. 471.

(3) *Kelly* v. *Lombard Banking Co. Ltd.* [1959] 1 W.L.R. 41.

(4) *Brooks* v. *Beirnstein* [1909] 1 K.B. 98.

(5) *South Bedfordshire Electrical Finance Ltd.* v. *Bryant* [1938] 3 All E.R. 580.

(6) *Stockloser* v. *Johnson* [1954] 1 Q.B. 476.

(7) *Campbell Discount Co. Ltd.* v. *Bridge* [1961] 2 All E.R. 97.

(8) *Maynard* v. *Mosely* (1676), 3 Swan 655.

(9) *Galbraith* v. *Mitchenall Estate Ltd.* [1964] 2 All E.R. 653.

(10) *United Engineers (Malaysia) Ltd.* v. *Lai Ping Yoon* [1968] 1 M.L.J. 189.

(11) *Overstone Ltd.* v. *Shipway* [1962] 1 W.L.R. 117.

(12) *Maung Ba Oh* v. *Motor House Co. Ltd.* A.I.R. 1929 Rangoon 368.

(13) *Abdul Quaddeer* v. *Watson & Sons Ltd.* A.I.R. 1930 Rangoon 193.

(14) *Enayatullah Khan* v. *Jalan Trading Co. & Anor.* A.I.R. 1965 Patna 274.

FEDERAL COURT.

A.D. Rajah for the appellants.

R. Talalla for the respondent.

Cur. Adv. Vult.

Gill F.J.: This is an appeal from a decision of the High Court whereby, on a claim by the

appellants as plaintiffs for $19,788 in respect of arrears of hire-rent under a hire-purchase agreement, judgment was entered in the sum of $3,047 against the respondent as guarantor for the hirer under the said agreement. The hirer and the guarantor were sued in the court below as the first and the second defendant respectively.

There was no dispute about the facts of the case. By a hire purchase agreement in writing dated the 1st of March, 1963, the plaintiffs as owners agreed to let and the first defendant as hirer agreed to hire a tractor Model K7E bearing engine No. 1357792. The first defendant was to pay to the plaintiffs at the time of the signing of the agreement a sum of $6,451 in cash "in consideration of the option to purchase" thereby granted. Thereafter, by way of monthly hire-rent for the tractor, he was to pay punctually without previous demand a sum of $2,366 on the 1st day of each month until the total of such payments together with the payment made for the option to purchase amounted in the aggregate to $49,034, which was the agreed hire-purchase price. The first of such hire-rent payments was to be made on the 1st day of April, 1963.

Clause 7 of the agreement provided that if the agreement was meanwhile duly observed by the hirer, he might at any time become the owner of the tractor by paying such sum as together with the sums paid for the option to purchase and as hire-rent would in the aggregate amount to the hire-purchase price, and that thereupon the agreement was to determine, but until such determination the property was to remain the sole property of the owners and the hirer a mere bailee thereof.

The second defendant, in consideration of the plaintiffs having agreed to hire the tractor to the first defendant, undertook and guaranteed the payment of the said rent and all other sums of money which might become payable by the first defendant under the terms of the said agreement and the performance and observance of the stipulations and conditions by the first defendant therein contained, and he undertook to indemnify the plaintiffs against all loss, damage or expense which the plaintiffs might sustain by reason of the neglect of the first defendant to observe and perform any of the stipulations on his part contained in the said agreement.

In the event of default by the first defendant to pay the hire-rent instalments on the due dates, clause 4(a) of the agreement empowered the plaintiffs without notice or demand and without prejudice to any claim for arrears of hire-rent or damages for breach of agreement forthwith to terminate the hiring and retake possession of the tractor. Clause 4(b) of the agreement entitled them by written notice to the first defendant forthwith for all purposes and absolutely to determine and end the agreement, but such determination was not to discharge any pre-existing liability of the first defendant to the plaintiffs.

Clause 5 of the agreement gave the hirer the right to terminate the agreement by returning the property to the owners, but in such case he was to remain liable for arrears of hire-rent and for damages for breach of agreement, if any.

Clause 6 of the agreement provided that if the hiring was determined under either clause 4 or 5 of the agreement, the hirer was not to be entitled to repayment of any of the sums paid under the terms of the agreement and that in the event of such termination of hiring the owners were to be entitled to compensation for depreciation at the rates specified therein.

The first defendant duly paid the initial payment of $6,451 under the agreement. By way of hire-rent he paid a sum of $13,336 up to 6th May, 1964 when the total amount due as hire-rent was $33,124, so that by that date he was in arrear with the rent to the extent of $19,788. On the same date the plaintiffs sent a letter to the first defendant to say that as he had failed to pay his instalments they had instructed their representative, Mr. Hui Wing Foo, to repossess the tractor. The tractor was in fact repossessed on 9th May, 1964.

On the question of notice to terminate, the learned trial judge, following what I said in *Anglo-American Corporation Ltd.* v. *Goodwood Sawmill Co.*,[1] found that no notice was required to terminate the hiring under clause 4(a) of the agreement in the present case. He also found that if a notice was required to determine the hire-purchase agreement absolutely for all purposes under clause 4(b) of the agreement, the letter dated 25th May, 1964 sent by the plaintiffs to the first defendant with a copy to the second defendant as guarantor was sufficient notice for that purpose. Those findings of the learned trial judge have not been challenged in this court.

The learned trial judge further found that by reason of section 98 of the Contracts (Malay States) Ordinance, 1950 the second defendant as guarantor was liable to pay whatever sum was found to be payable by the first defendant under the agreement and that he in turn was entitled to recover any such sum from the first defendant as principal debtor.

Having thus ascertained the position of the second defendant with regard to liability, the

learned trial judge proceeded to assess the amount payable under the agreement by applying the provisions of section 75 of the Contracts (Malay States) Ordinance, 1950. That section reads as follows:—

> "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

On that basis the learned trial judge found that the amount recoverable by the plaintiffs was $3,047. He arrived at this figure in the following way. The agreed hire-purchase price under the agreement was $49,034. The first defendant had paid a total of $19,787 under the agreement by way of initial deposit and hire-rents. The balance of the hire-purchase price remaining unpaid therefore was $29,247. The plaintiffs resold the seized tractor for $32,200 after spending $6,000 on its repairs. so that the amount which they recovered after such resale was $26,200. The balance of the hire-purchase price being $29,247, the amount recoverable by the plaintiffs after deducting the sum of $26,200 realised from the sale of the tractor was $3,047.

With respect, the learned trial judge was in error when he dealt with the plaintiffs' claim on the basis that it was a claim for damages for breach of contract. The plaintiffs had in fact originally claimed a sum of $19,788 by way of compensation for depreciation under clause 6 of the agreement, which in effect was a claim for damages for breach of contract, but that claim was abandoned by counsel for the plaintiffs at the start of the trial. This meant that the only claim remaining against the two defendants, apart from the claim of $500 as the cost of repossessing the tractor, about which there was no dispute, was in respect of arrears of hire-rent. The claim for damages having been withdrawn, section 75 of the Contracts Ordinance, to my mind, had no bearing whatsoever on the case.

From the method adopted by the learned trial judge to ascertain the amounts which the plaintiffs were entitled to recover on their claim, it would appear that his Lordship dealt with the transaction between the parties on the footing that it was a contract of sale by instalments. In a contract of sale of goods by instalments, if there is no forfeiture clause, upon a rescission of the contract by the seller in consequence of the buyer's fault, the buyer is entitled to recover the instalments paid in part pre-payment of the price, subject to a cross-claim by the seller for damages for breach of contract. But this principle cannot apply to a true hire-purchase agreement, where the instalments are paid as hire-rent for the hire of the goods, and not as pre-payment of the purchase price.

A true hire-purchase agreement, as explained by the House of Lords in *Helby* v. *Matthews*,[2] is an agreement by which the owner of a chattel lets it out on hire and undertakes that it shall become the property of the hirer when the hirer has paid the last of a certain number of payments specified in the agreement, but so that the hirer may return the goods at any time without any obligation to pay any balance of rent accruing after the return. Until those conditions have been fulfilled the property remains in the owner. Since no property in the chattel passes to the hirer until he has made the last of the payments specified in the agreement, the agreement need not be registered as a bill of sale. Such an agreement differs from a sale inasmuch as the hirer does not agree to buy. He merely has an option to buy on fulfilment of certain conditions, or he may return the goods on payment of a sum stated in the contract. In other words, a hire-purchase agreement is not an agreement to buy goods, unless it contains an obligation whereby the hirer is bound to buy.

The hallmark of a true hire-purchase agreement is that there is reserved to the hirer power to return the goods, either during the hiring, thereby determining the bailment, or after the conclusion of the hiring and before the payment of such further sum as is required to complete the purchase, so that the agreement is not a contract of sale but an agreement to hire with an option to purchase. In short, it is a bailment coupled with an option to buy. The agreement normally provides for a sum of money to be paid "in consideration of the option to purchase" thereby granted either initially or at any time during the period of the hiring or at the end of the hiring.

It was never in dispute that the agreement in the present case was a true hire-purchase agreement. It provided for the initial payment by the hirer of a sum of $6,451 in consideration of the option to purchase. The hirer was to pay a monthly hire-rent of $2,366 until the total of the initial payment and the hire rents amounted in the aggregate to the hire-purchase price of $49,034. Until the last of such payments the tractor was to remain the sole property of the owners, and in the meantime the hirer was to be a mere bailee thereof. The hirer could terminate the agreement by returning the tractor to the owners, but in that event he was to remain liable to pay arrears of hire-rent and damages for breach of agreement. If he failed to pay the hire-rents, the owners were

entitled to terminate the hiring, retake possession of the tractor and claim arrears of hire-rents and compensation for depreciation by way of damages. The agreement specifically provided that if the hiring was terminated either by the hirer or the owners, the hirer was not to be entitled to repayment of any of the sums paid under the terms of the agreement.

The first payment made under the hire-purchase agreement in this case was the sum of $6,451. This was paid in consideration of the option to purchase granted under the agreement to the hirer. The agreement was prematurely determined by reason of the hirer's failure to pay the hire-rent instalments. It might be argued that because of such premature determination of the agreement, the hirer was prevented from exercising the option. Such an argument was put forward in *Kelly* v. *Lombard Banking Co. Ltd.*,[3] in which the hirer sought to recover the initial payment on the ground that it was money paid on a consideration which had totally failed by reason of the premature determination of the agreement. It was contended that on the wording of the clause the option did not come into being until the end of the hiring when all the payments had been made. This contention, however, was rejected by the Court of Appeal. Lord Denning said in his judgment at page 44:—

"I cannot agree with that interpretation of the contract. It seems to me that the option to purchase is an existing right which exists as from the date of this agreement. It is true that it is subject to conditions: it is subject to the hirer fulfilling his obligations in order to be entitled under it. But, nevertheless, the option to purchase is an existing right as from the moment of signing the contract and the payment of the money. So he has got what he has paid for. He has to fulfil the conditions in order to exercise the option. But he has paid for an option which he has got."

As I have already stated, the instalments paid under a true hire-purchase agreement are paid by way of rent for the hire of the goods. The owner has a valid claim to receive such payments while the contract of hire continues. He has therefore a right to recover all instalments which were due and payable until the hiring is terminated. The right to receive arrears due is a separate cause of action from the right to recover possession of the goods. Consequently, the fact that the owner recovered possession of the goods does not deprive him of his right to sue for arrears of instalments. This is clear from the following passage in the judgment of Bingham J. in *Brooks* v. *Beirnstein* [4] at p. 102:—

"The agreement, in so conferring the right to retake possession on a breach by the hirer, does not take away any other rights which the law gives to the owners, among which rights is that of suing for the monthly rent which had already accrued. It is suggested that because the clause which enables the hirer to terminate the hiring provides that such termination will be 'without prejudice to the owners' right to recover any arrears of rent', whereas the corresponding clause which enables the owners to retake possession does not contain those words, it was intended that in the event of the owners adopting the remedy provided by the latter clause they should not be entitled to recover any arrears of rent. I do not think the agreement can be so treated as to make it appear that any such intention was in the minds of the parties. If, as I have already said, the agreement is nothing but an agreement for hiring plus an option to purchase, how has the accrued right of action for the rent been got rid of? If it could be said that by taking away the goods the owners had deprived the hirer of all consideration for the rent, then I could understand that the accrued cause of action would be gone. But in truth the hirer has enjoyed the use of the furniture which was the consideration for the rent, and I can see no reason why he should not be liable to pay the arrears claimed."

Conversely, the fact that the owner has brought an action and recovered judgment for the arrears of instalments does not preclude him from bringing a separate action for possession of the goods: *South Bedfordshire Electrical Finance Ltd.* v. *Bryant.*[5] *Halsbury's* 3rd Edition Vol. 19 at page 546 says as follows:—

"The owner's right to seize or retake possession of chattels let under a *bona fide* hire purchase agreement does not convert the agreement into a bill of sale, as, in such case, the hirer not being the owner of the chattels, the licence to seize only empowers the owner to retake possession of his own chattels. If the owner exercises his right to resume possession on default in payment, equity will not release the hirer from the effect of his default, even if nearly all the instalments have been paid and the arrears are tendered before action brought, the provision not being in the nature of a penalty."

It might be argued that the court has power in equity to order the owner to return part of the payments made by the hirer if the circumstances are such that it would be unconscionable to allow the owner to retain the payments in full, as, for example, where the hirer has made a large initial payment and the agreement is terminated by the owner for some comparatively minor breach. In *Stockloser* v. *Johnson,*[6] a case on a repudiated contract of sale, Somervell L.J. and Denning L.J. were firmly of the opinion that the court has this power. On the other hand, Romer L.J. felt equally clear that, since the parties had made their own bargain and no question of a penalty in the proper sense of the term arose, the court could not interfere. In the case itself it was held as a matter of fact that there was nothing unconscionable in the defendant retaining the payments made to him, so that the point did not have to be decided. In *Campbell Discount Co. Ltd.* v. *Bridge* [7] at p. 103, Holroyd Pearce L.J. having reviewed a number of earlier authorities including the case of *Stockloser* v. *Johnson,*[6] said at the conclusion of his judgment:—

"It would be a novel extension for the law to interfere on equitable grounds with ordinary contracts

freely entered into by persons under no duress or mistake merely on the ground that in certain events it has turned out harshly for parties who subsequently wished or were compelled by circumstances to abandon their contracts."

Harman L.J. in the same case said in his judgment at the same page:—

"Similarly I rather deprecate the attempt to urge the court on what are called equitable principles to dissolve contracts which are thought to be harsh, or which have turned out to be disadvantageous to one of the parties. The observation of Lord Nottingham C., in *Maynard* v. *Moseley* [8] is still true that: ' . . . . the Chancery mends no man's bargain,' and I do not therefore see my way to call in aid equity to mend what may be an unfortunate situation and one which, if it calls for remedy, calls for aid by the legislature rather than by the justiciary."

The dicta of Romer L.J. in *Stockloser* v. *Johnson* [6] and of Holroyd Pearce and Harman L.JJ. in *Campbell Discount Co. Ltd.* v. *Bridge*,[7] were applied in *Galbraith* v. *Mitchenall Estates, Ltd.*,[9] in which by a contract for the hire of a caravan the hirer was to make an initial payment of £500. 10s., followed by sixty rents of £12. 10s. The retail price of the caravan was £1,050. The contract of hire was a long document in small print, which the hirer signed without reading on the assumption that it was a contract of hire-purchase. There was no sharp practice or unconscionable conduct on the part of the finance company, with which the contract was made, in obtaining the agreement. The hirer paid the initial payment, and had delivery of the caravan. After he had lived in it with his family for some four months, the owners re-possessed the caravan under the terms of the contract, the hirer having failed to pay rentals. At the date of re-possession the caravan was worth £800. The position created by the contract was that the owners could both retain the initial payment and have re-possession of the caravan. The caravan was sold subsequently by the owners for £775, having been somewhat damaged by the re-possession agents. The contract also entitled the owners to enforce payment of a proportion of the outstanding rentals, but they took no action under these provisions. In an action by the hirer for recovery of the initial payment, it was held that although the contractual position enabling the owners to retain both the initial payment and the caravan was one of undue harshness yet there was no equity to re-model a contract freely negotiated and entered into without either fraudulent or unconscionable conduct by the other party thereto; accordingly, the action was dismissed.

It is abundantly clear from the authorities that where under a true hire-purchase agreement the owner terminates the hiring because of the hirer's default in payment of the hire-rent as and when they fall due, as provided in the agreement, the hirer cannot recover any payment made under the agreement up to the date of such termination. The owner in such a case has the unfettered right to retake possession of his property and resell it without having to account to the hirer for the amount realised on such resale. It follows therefore that where the owner is claiming only arrears of instalments up to the date of termination of hiring by reason of the hirer's default, the amounts previously paid by the hirer and the amount realised by the resale of the property are wholly irrelevant to the claim. They may become relevant and may therefore have to be brought into account only where the owner is also claiming damages for breach of contract.

In *United Engineers (Malaysia) Ltd.* v. *Lai Ping Yoon* [10] I stated that the arrears of instalments represent an accrued debt due to the owner from the hirer and that the right to receive payment of such a debt is a separate cause of action from the right to recover damages for breach of contract. For that statement of the law I relied on the case of *Overstone Ltd.* v. *Shipway* [11] in which the hirer, having paid the initial deposit and taken delivery of the goods, paid none of the instalments of hire. The owners terminated the agreement and retook possession of the goods. They then brought an action in the county court for four monthly instalments due at the time of re-possession and recovered judgment. Shortly afterwards, having sold the goods, they brought a second action in the county court claiming damages for breach of contract. The Court of Appeal (Wilmer L.J. dissenting) held that they were not estopped either at common law or under section 69 of the County Courts Act, 1959, from bringing this second action for breach, as the two causes of action were distinct and separate.

I can find nothing in the circumstances of the present case to warrant my coming to a different conclusion.

Counsel for the respondent conceded that the authorities appeared to be against him but he contended that the plaintiffs' claim was in fact a claim for damages. I cannot agree with that contention. As I have previously stated, there was a separate claim for damages, but that was abandoned. Counsel then sought to distinguishe this case by citing two Burmese cases and an Indian case. In the first Burmese case of *Maung Ba Oh* v. *Motor House Co., Ltd.*[12] it was held that although the agreement was in the form of a hire-purchase, the object of the parties in drawing it up was to enter into a contract of sale. In the second case of *Abdul Quaddeer* v. *Watson & Sons Ltd.*[13] it was held that the retaking of the chattel and the retention of money already paid under the

seizure clause in the hire-purchase agreement did not amount to a penalty within the meaning of section 74 of the Contracts Act which is equivalent to section 75 of our Contracts (Malay States) Ordinance, 1950. In the Indian case of *Enayatullah Khan* v. *Jalan Trading Co. & Anor.*,[14] there was a dispute as to whether the contract was one of hire-purchase or of sale a stipulation in the contract that the owner was to seize the car in default of payment of instalments by the hirer. The hirer pleaded that by subsequent oral agreement the owner was to sell the car and to adjust the price towards the balance of instalments and to refund the balance of sale proceeds to the hirer, and that thus it was a contract of sale. It was held that the plea itself conceded that the contract was of simple hire-purchase. The defence case as to the subsequent oral agreement having been disbelieved, it was held that there was nothing left on the record to give support to the claim of the appellant that the price of the car seized from him should have been set off as against the hire instalments which were still left due against the appellant. It is clear that none of those three cases is of any help to the respondent.

The main ground of appeal here is that the learned trial judge misdirected himself in law in that he failed to distinguish between the claim for arrears of monthly hire-rent under clause 1 of the agreement and the claim by way of compensation for depreciation under clause 6. The other substantial ground of appeal is that no case had been made out by the respondent for equitable relief which could exempt him from liability to pay hire-rent. In my judgment the appellants are entitled to succeed on both those grounds of appeal.

I would therefore allow the appeal, set aside the judgment of the learned trial judge and substitute in its place judgment for the plaintiffs in the sum of $19,788 in respect of arrears of hire-rent and $500 in respect of repossession charges, making a total of $20,288 with interest as claimed. The respondent must pay the costs of this appeal and the costs in the court below.

Azmi L.P. and **Suffian F.J.** concurred.

Appeal allowed.

Solicitors: *Lovelace & Hastings; Richard Talalla & Co.*

PUBLIC PROSECUTOR v. TANG CHEW WENG

[A.Cr.J. (Chang Min Tat J.) February 14, 1969]
[Ipoh — Perak Criminal Appeal No. 48 of 1968]

Dangerous Drugs — Possession of opium — Opium found in bags in berth of accused on railway coach — Accused found sleeping in berth — Whether accused could be said to be in possession of opium — Dangerous Drugs Ordinance, 1952.

The facts in this case were that in the course of the search of the night mail train from Penang the police found opium in two bags which were in the sleeping berth occupied by the accused on the train. The accused was found sleeping in the berth. The learned president of the sessions court acquitted the accused at the close of the prosecution case as he said "As far as I am aware of there is no law to say or presume that a sleeping man is conscious of anything at all". The Public Prosecutor appealed.

Held, allowing the appeal: the learned president was wrong in holding that a person otherwise in custody or possession loses the awareness of the custody or possession when he is asleep and in this case the accused should have been called upon to enter on his defence.

MAGISTRATE'S CRIMINAL APPEAL.

M. Mahalingam (Deputy Public Prosecutor) for the appellant.

Soo Wai Sun (*Mariadass* with him) for the respondent.

Cur. Adv. Vult.

Chang Min Tat J.: The respondent was charged in the Sessions Court at Ipoh with the offence punishable under section 6 of the Dangerous Drugs Ordinance No. 30 of 1952 of being found in possession of 16½ lbs. of raw opium valued at about $2,475. At the close of the case for the prosecution the respondent was acquitted and discharged on the finding of the learned president, after submissions, that no *prima facie* case had been made out against him. Against that decision, the public prosecutor now appeals.

The case for the prosecution was based on the evidence of two police inspectors, a detective sergeant and a detective corporal. These witnesses were in a police party which boarded the night mail from Penang on 26th June, 1968 at about 1.30 a.m. The party split into two and entered coach D at both ends, thus effectively sealing the coach against any escape. It was a coach for sleeping berths. Inspector Quah Hock Lye (P.W.2) went up to berth No. 27 which would appear to be an upper berth, parted the two curtains which had been drawn and knotted and found the accused sleeping therein. He was alone. Inside his berth were two bags, one at his feet and the other on the shelf by the side. The two bags were taken possession of and the accused was arrested.